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No. 91-1242

In the Supreme Court of the United States

October Term, 1991

ALASKA AIRLINES, INC. and
TRANSTAR AIRLINES CORPORATION,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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SUMMARY OF ARGUMENT

Petitioners (Alaska Airlines, Inc., Transtar Airlines Corporation and Northwest Airlines, Inc.) submit this Reply Brief in Support of their Petition for Writ of Certiorari pursuant to United States Supreme Court Rule 15.6. Contrary to respondents' arguments, certiorari should be granted for at least three reasons.

1. There is a clear and definite conflict among the circuits with respect to monopoly leveraging. It is simply wrong to assert that the circuits have relied on *Copperweld Corp. v. Independence Tube Corp.* 467 U.S. 752 (1984), to erode *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

2. There is also a clear conflict among the circuits with respect to the essential facilities doctrine.

3. Assuming the Ninth Circuit was wrong on either its monopoly leveraging holding or its essential facilities holding, the case must be remanded to the district court for trial.

I.

THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS ON THE MONOPOLY LEVERAGING DOCTRINE THAT HAS NOT BEEN RESOLVED BY THIS COURT'S DECISION IN *COPPERWELD.*

The scope of the conflict among court decisions and academicians on the monopoly leveraging doctrine is well documented.[1] To avoid resolution of that conflict by this Court,

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[1] Citing a series of law review articles (extracted from *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984), respondent American Airlines, Inc., correctly observes that *Berkey* has been criticized. However, it has also been praised. *See* Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515 (1985), and the articles cited therein. Professor Kaplow's article begins with

(continued...)

respondents assert that this Court's decision in *Copperweld* has shown the lower courts "the light," and that *Copperweld* will now be uniformly "understood" and applied by other courts as it was in the Ninth Circuit's decision below as repudiating *Berkey*. Therefore, respondents conclude, there is no need for this Court to trouble itself with resolving the present conflict. That is wrong. Not a single case (aside from this one) even mentions *Copperweld* in analyzing or discussing monopoly leveraging.

First, as respondent American Airlines, Inc. ("AA") admits, the Sixth Circuit in *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub nom. G. K. C. Michigan Theatres, Inc. v. National Amusements, Inc.*, 490 U.S. 1087 (1989), followed *Berkey* without even mentioning *Copperweld*.[2] The Sixth Circuit saw nothing in this Court's *Copperweld* decision that even required discussion, much less mandated rejection of *Berkey*. Nor can AA

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[1](...continued)
these words: "The debate over the ability of firms to use restrictive practices to leverage their monopoly power from one market to another has continued throughout the history of the antitrust laws."

[2] AA, in its desperation to distinguish *Kerasotes*, says it "was not actually a leveraging case." (AA brief at 15 n.17.) AA characterizes *Kerasotes* as a conspiracy, rather than a unilateral conduct, case. But a simple reading of its holding dispels that view: "To run afoul of the antitrust laws, it is not necessary that *the party* attempting to leverage *its* monopoly power from a given market into a second market possess monopoly power or dominant market position in that second market." 854 F.2d at 137 (emphasis added). The *Kerasotes* court went on to note that "to extend *a business*' dominance from one market into a second market, without having to achieve that dominance in the second market" was unlawful. *Id.* (emphasis added to demonstrate that the court was addressing a single firm conduct). Moreover, *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1566-68 (11th Cir. 1990), cited by AA, clearly views Kerasotes as a leveraging case that follows *Berkey*.

plausibly maintain that the Sixth Circuit changed course two years later in *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1422-23, 1426-27 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 274 (1991). While the court in Langenderfer quoted extensively from *Copperweld*, it did so merely to distinguish generally between Sections 1 and 2 of the Sherman Act—*not* to comment on *Kerasotes*. To the contrary, the Sixth Circuit expressly addressed *Kerasotes* separately, explaining that *Kerasotes* "was principally concerned with 'leveraging' or misuse of monopoly power in one market to exclude a competitor from another market" (*id.* at 1426), and therefore inapplicable to the case at bar. Accordingly, there is no suggestion that the Sixth Circuit has retreated from its endorsement of and continued reliance upon *Berkey*, or that it sees any conflict between *Berkey* and *Copperweld*.

The other cases cited by AA are devoid of reference to *Copperweld*. The earlier Ninth Circuit decisions which reserved judgment on monopoly leveraging failed to cite or even mention *Copperweld*. *See Catlin v. Washington Energy Co.*, 791 F.2d 1343 (9th Cir. 1986); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Grason Electric Co. v. Sacramento Municipal Utility District*, 571 F. Supp. 1504 (E.D. Cal. 1983). The D.C. Circuit has found no relevance in *Copperweld* to the monopoly leveraging doctrine. *Copperweld* was decided by this Court *after Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association*, 735 F.2d 577 (D.C. Cir. 1984), was decided by the D.C. Circuit. When it revisited monopoly leveraging in *United States v. Western Electric Co.*, 900 F.2d 283 (D.C. Cir. 1990), *cert. denied sub nom. MCI Communications Corp. v. United States*, ___ U.S. ___, 111 S. Ct. 283 (1990), the D.C. Circuit did not even mention *Copperweld*. The Second Circuit, which AA claims is backing away from *Berkey*, did not mention *Copperweld* in either *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672 (2d Cir. 1985) (citing *Berkey* and

United States v. Griffith, 334 U.S. 100, 107 (1948), for the monopoly leveraging elements), or *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 571 (2d Cir. 1990) (holding that plaintiff's claim in that case did not come within *Berkey*'s proscription because of failure to prove "tangible harm to competition").

While the Eleventh Circuit, in its substantial discussion of monopoly leveraging in *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1567-68 (11th Cir. 1990), did "harbour some reservation about the Second Circuit's conclusion that no attempt to monopolize the leveraged market need be proved," the court never once mentioned *Copperweld*. Finally, the Fourth Circuit in *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, 910 F.2d 139, 149 n.17 (4th Cir. 1990), "assume[d] that monopoly leveraging is an independent § 2 violation separate from monopolization and attempted monopolization," but "reserve[d] definitive resolution of that issue for a case in which the issue is squarely presented." That court, too, did not mention *Copperweld* in its monopoly leveraging discussion.

The district court cases relied on by AA likewise fail to support the view that *Copperweld* laid *Berkey*, *Kerasotes* and monopoly leveraging to rest. *M & M Medical Supplies & Service, Inc. v. Pleasant Valley Hospital, Inc.*, 738 F. Supp. 1017, 1021 (S.D. W. Va. 1990) viewed "harm to competition in another market" as embraced within the attempt to monopolize clause of Section 2. But its reasoning is not extensive and the monopoly leveraging discussion does not cite to *Copperweld*. Finally, *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp. 1437, 1461 (D. Kan. 1990), *aff'd on other grounds*, ___ F.2d ___, 1992-1 Trade Cas. (CCH) ¶ 69,703 (10th Cir. 1992), also does not mention *Copperweld* in its discussion of whether the Tenth Circuit would recognize monopoly leveraging as a separate offense.

Not a *single case* cited by AA in its brief relied on—or even mentioned—*Copperweld* in its monopoly leveraging discussion. Only the Ninth Circuit has concluded that *Copperweld* rejected the monopoly leveraging doctrine articulated in *Berkey*. The reason no other court has relied upon *Copperweld* is that it has nothing to do with monopoly leveraging. *Copperweld*, aside from its holding that wholly owned subsidiaries cannot "conspire" with their parents for Sherman Act purposes, suggests that single firm conduct is actionable only when it "pose[s] a danger of monopolization." 467 U.S. at 768. That statement, with due respect, does no more than state the obvious. But here monopoly power is a given. The district court found that there was sufficient evidence of monopoly of the first or leveraging market for computerized reservations services to go to a jury: "The court has considered the internal elements under the theory of monopoly leveraging and has determining [sic] that plaintiffs have presented evidence sufficient to survive a motion for summary judgment." (App. 70a.) *Copperweld* did not decide whether, as the Ninth Circuit held, only the wilful *acquisition or maintenance* of monopoly power is within the reach of Section 2. Nor did *Copperweld* decide whether the use of monopoly power in one market to impair competition in a second market is permissible. *Copperweld* is silent on those questions and so it has not been and should not be cited as controlling in any serious consideration of the monopoly leveraging issue.

That very question—whether Section 2 also reaches misuse of monopoly power—has been addressed by an eminent judge in a post-*Copperweld* case. In *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987), cited extensively by AA, Judge Posner acknowledged the *Berkey* rule without questioning its validity:

> If, to maximize its profits in its monopoly market, a monopolist restricts competition in a related

> market, its conduct is actionable in a suit by a firm that is the target of the abusive practice.

Id. at 374. And Judge Posner explained why: "Not the possession, but the *abuse*, of monopoly power violates section 2." *Id.* (emphasis added).

Despite AA's attempt to bury it through *Copperweld* (a position supported only by the Ninth Circuit) *Berkey* lives—in the Seventh Circuit and every other circuit that has decided the question.

Copperweld simply did not rule on whether the use of monopoly power to lessen competition in a second, related market violates Section 2. There is a clear split among the circuits and expressed uncertainty in those circuits which have not yet specifically ruled. The academicians are divided. Conduct that is now legal in Los Angeles would subject a defendant to treble damage liability in New York or Detroit. The business community, the bench and the bar need to have this issue decided. Certiorari to review the monopoly leveraging question is entirely appropriate.

II.

THE CIRCUITS ARE ALSO IN CONFLICT ON THE ESSENTIAL FACILITIES DOCTRINE

Despite respondents' attempt to dance around the conflict, there is no way to reconcile the "severe handicap" standard of *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), or the Eighth Circuit's "inhibit competitors" standard in *City of Malden v. Union Electric Co.*, 887 F.2d 157 (8th Cir. 1989), with the "eliminate competition" test adopted here by the Ninth Circuit (App. 15a). No court other than the Ninth Circuit has expressly articulated that denial or limitation of access to an essential facility becomes actionable only if it threatens to produce or actually produces monopoliza-

tion. (*Id.* 17a.) These stringent standards render the doctrine of essential facilities redundant because any conduct meeting such standards could be independently attacked under the attempt to monopolize or monopolization clauses of Section 2. Thus, the Ninth Circuit is squarely at odds with the Second Circuit in *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 179-80 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2041 (1991), which expressly treated essential facilities as an independent claim, separate from attempted monopolization or monopolization.

Accordingly, even without relying on what respondents refer to as "concerted action" cases, it is evident that the Ninth Circuit has adopted a far more restrictive test for essential facilities than any other circuit. The Ninth Circuit's holding that there was no denial of access. (App. 16a)—argued at length by United—flies in the face of this Court's holding in the seminal essential facility case *United States v. Terminal Railroad Association*, 244 U.S. 383 (1912), requiring an "equal plane" between the owner of the facility and the competitor. By providing a "safe harbor" for the use of monopoly power falling short of an independent Section 2 violation, the Ninth Circuit sets itself far apart from the rest of the circuits. This sharp disparity, and the uncertainty and inconsistency it engenders, should be addressed by this Court.

III.

THE DISTRICT COURT EXPRESSLY FOUND THAT, BUT FOR THE REQUIREMENT OF THREATENED OR ACTUAL MONOPOLIZATION, THE MOTION FOR SUMMARY JUDGMENT WOULD HAVE BEEN DENIED

Respondents contend that summary judgment was sustainable independent of the erroneous conclusion that both monopoly leveraging and essential facilities require either

threatened or actual monopolization in the downstream market. That is plainly wrong.

The district court itself rejected this contention: "The court has considered the internal elements under the theory of monopoly leveraging and has determining [sic] that plaintiffs have presented evidence sufficient to survive a motion for summary judgment. However, it does not appear that the monopoly leveraging theory is consistent with the requirements of Section 2 of the Sherman Act. *On that basis, the court grants defendants' motion for summary judgment.*" (App. 70a (emphasis added).)

On the essential facilities claim, the district court found that defendants "may be able to raise . . . rival's costs through imposing monopoly prices in a related market" and that while this "may be enough to 'restrain trade', it is not enough to create a danger of monopolization." (*Id.* 38a n.4.)

The district court, therefore, found genuine issues of material fact as to whether respondents' conduct would "restrain trade," but then concluded that such level of restraint was legally insufficient, and granted summary judgment.

The Ninth Circuit, apparently to buttress a novel and unprecedented ruling which departs sharply from well settled Section 2 doctrine also impermissibly assumed the role of fact finder and decided the case as though it were a jury. In performing that role, it: (1) impermissibly ignored respondents' ability to impose a price squeeze on its competitors; (2) wrongly assumed that airlines were perfectly free, without serious consequence, to withdraw from a computer reservation system; (3) mistakenly concluded that travel agents were free to change computer reservation systems without serious consequences; and (4) placed undue reliance on market share as the dispositive measure of market power. This series of factual findings violates the basic procedures applicable to summary judgment. Moreover, the Ninth Circuit's findings are internally inconsistent and implicitly acknowledge that respondents had power adequate to price their

competitors out of the market. Therefore, on that basis it should have allowed the case to proceed, even under its incorrect ruling that only when competition in the downstream market is threatened with complete elimination is the monopolist's conduct actionable.

IV.

CONCLUSION

The Ninth Circuit is out of step with the rest of the circuits in holding that both monopoly leveraging and essential facilities require proof of actual or threatened monopolization of the downstream market. Disparate standards now prevail in this critical area of antitrust law. The case law and the academicians are fundamentally divided on this important issue. We respectfully urge the Court to grant certiorari, to resolve the conflict and terminate the debate.

Respectfully submitted,

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March 26, 1992

PROOF OF SERVICE BY MAIL

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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on March 26, 1992, I served the within *Reply Brief Of Petitioners* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 26, 1992, at Los Angeles, California.

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